WAKIL DIRI BAGI HARTA PUSAKA ATAS ROSLI MD NOR (SIMATI) & ORS

v.

TP SAFFEER & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 12-57-1996]
1 JULY 1997

DAMAGES: *Fatal accident - Loss of earnings - Deceased an Indian National - Working without a work permit - Whether earnings illegal - Whether could be computed for purposes of loss of earnings - Quantum - Sufficiency - Whether quantum awarded would adequately compensate the plaintiffs*

CIVIL PROCEDURE: *Appeal - Facts - Not taken at trial - Whether could be raised on appeal - Specific findings of fact by trial judge - Whether ought to be interfered with by appellate court*

The second respondent housewife in this case had lost her husband ('the deceased') when the latter died in a road accident at the age of 27. At the material time the deceased was gainfully employed at a restaurant and was earning some RM1,250 a month. In the court below liability was denied on the pleadings but was admitted in the course of the trial. Evidence was also adduced that the deceased had led a frugal life, and that, out of his said earnings, he had remitted a sum of RM1,000 to the second respondent and their son in India for their upkeep. The learned trial judge, however, was not prepared to accept the second respondent's assertion as to her loss of dependency aforesaid, and so reduced her loss of earnings by taking the figure of RM700 per month. Upon a multiplier of 16, the sum of RM134,000 for loss of earnings was awarded to the second respondent. The appellants appealed and contended *inter alia* that the learned trial judge was wrong in making the award as the deceased's earnings were based on fabricated salary vouchers, and that his earnings, in any case, were illegal. It was not disputed that this point, which was raised before the instant court, was never taken before the trial court. It was also not disputed that the deceased was an Indian national, had no work permit and did not contribute either to the EPF or SOCSO.

Held:

[1] A question of fact, not taken at the trial court, may not be presented for the first time in an appellate court. In any case, the trial court herein had concluded that the vouchers which were alleged to be fabricated were in fact not a sham. Thus, there was no ground for this court to interfere with that specific finding of fact.

[2] The earnings of the deceased could in law be legitimised and that being so the earnings derived were not illegal. Those earnings could be computed for purposes of loss of earnings sustained.

[3] The earnings of the deceased were strictly proved and the respondents must succeed on that score.

[4] There should not be any deduction for the living expenses of the deceased as the same were not admitted or proved. This court was however unable to disagree with the trial court's assessment of the loss of earnings. The quantum as arrived at by the trial court was sufficient to fairly compensate the widow and her retarded son for the rest of their lives in India.

[Appeal dismissed.]

Cases referred to:

Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor [1995] 4 CLJ 317 ***(foll)***
Amar Singh v. Chin Kiew [1960] 26 MLJ 77 ***(foll)***
Chua Kim Suan & Teoh Teik Nam v. Government of Malaysia & Anor [1994] 1 CLJ 321 ***(foll)***
Heatley v. Steel Co of Wales Ltd [1953] 1 All ER 489 ***(foll)***
Leng Yang Sua & Anor v. Ng Yen Kee & Anor [1986] 1 CLJ 338 ***(foll)***
Mathavan Shunmugam v. Woo Bee Leng [1995] 2 CLJ 957 ***(foll)***
Nazori Teh & Anor v. Tay Lye Seng & Anor [1995] 4 CLJ 740 ***(foll)***
Powell and Wife v. Streatham Manor Nursing Home [1935] AC 243 ***(foll)***
PR Panickar v. Chwee May Kwong & Anor [1958] 24 MLJ 136 ***(foll)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(foll)***
Tan Chooi Thin & Anor v. Teo Whee Hong [1953] MLJ 203 ***(foll)***
Tan Tek Yan v. Samuel [1964] 30 MLJ 283 ***(foll)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 30 MLJ 87 ***(foll)***
Yaakob Foong v. Lai Mun Keong & Ors [1986] 1 CLJ 355 ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 7(3)(iv)(a), (c)

For the 1st & 2nd appellants - Lai Kuan Jean; M/s Taye & Co
For the respondents - Rajandas Sankar; M/s GTS & Americk Sidhu

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Background

This was an appeal from the decision of the learned sessions court judge, Johor Bahru ("the trial judge") who awarded RM134,000 (it should be RM134,400) for loss of earnings with the usual interest and costs. It must be emphasised that the trial court had the opportunity and the privilege of having seen and heard the witnesses. I do not have that advantage.

The second respondent, Sherifa Tasiya, a widow and housewife had lost her husband who died in a road accident on 19 May 1991 ("deceased) at a relatively young age of 27. The second respondent and her son by the name of T.P. Saffeer were solely dependent for support from the deceased. This was quite natural as the second respondent and her son were 19 and 3 years of age respectively at the time of the accident. Before the trial court liability was denied on the pleadings, but in the course of the trial liability was admitted. Bereavement and funeral expenses were agreed at RM10,000 and RM1,500 respectively and the trial court made orders to that effect. The only contested issue before the trial court was the question of loss of support to the deceased's widow and her son. The parties agreed before the trial court that the statutory multiplier should be 16 years. It was apparent that the earnings of the deceased was hotly in dispute.

Only the first and the second appellants filed a notice of appeal against the decision of the trial court in regard to the quantum that was handed down for loss of earnings. The notice of appeal focussed its attention solely on the earnings of the deceased and the relevant proof thereof.

I will now proceed to examine the merits of the appeal under different sub-headings.

Whether a question of fact, not taken at the trial before the trial court, may be presented for the first time in an appellate court?

Miss Lai Kuan Jean, the learned counsel for the first and second appellants, argued that the salary vouchers of the deceased were fabricated. Before the trial court this point was never taken nor advanced and it did not form part and parcel of the submission of counsel for the first and second appellants. Mr. Rajandas Sankar, an equally learned counsel for the respondents, rightly argued that by raising this point for the first time before the appellate court the respondents were deprived of the opportunity of adducing evidence before the trial court to prevent the point from succeeding. More importantly, the

appellate court was deprived of all the facts bearing upon this new contentious point. Had the controversy been raised before the trial court, the appellate court would have the advantage of the printed evidence. But this was not to be. On this point, Wee Chong Jin CJ (Singapore) in *Tan Tek Yan v. Samuel* [1964] 30 MLJ 283 FC had this to say at p. 284 of the judgment:

> The other contention put forward by counsel for the appellant was that the notice to quit dated 29th March 1961 was subsequently waived by the notice to quit dated 27th July 1962 and that therefore the respondent was only entitled to mesne profits from the expiration of the second notice to quit. I am also unable to accept this contention. This point was not taken at the trial and was presented for the first time in this court. As Lord Herschell in *The Tasmania* [1890] 15 App. Cas at p. 22; said 'A point, not taken at the trial, and presented for the first time in the Court of Appeal ... ought to be most jealously scrutinised ... A Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial ...' Even though there is some evidence upon the matter, 'the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility could prevent the point from succeeding, it cannot be taken afterwards' (see *Ex parte Firth, In re Cowburn* [1882] 19 Ch. D 419 CA, per Jessel, MR at p. 429).

I have no hesitation in answering the question posed in the negative.

Whether the failure to put to the respondents' material witness in regard to the fabrication of the salary vouchers would bar the first and second appellants from raising up the issue on appeal?

The learned counsel for the first and second appellants never put nor suggest to the material witness, namely, K.P. Mohammed Kunhi s/o Abdul Kadir (SP1) during cross-examination that the salary vouchers were fabricated. Now, having miserably failed to put their case to this material witness during cross-examination, Miss Lai Kuan Jean cannot agitate this point at the appellate stage. I am fortified in my view by the joint decisions of Gopal Sri Ram and Mahadev Shankar JJCA in the case of *Sivalingam a/l Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395 CA where at p. 400 of the judgment their Lordships said:

> The main thrust of the defendants' case was that the plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. The plaintiff's case, on the other hand, was that he had been instructed by the first defendant to make the climb. But nowhere in the defence was it alleged that there was such a request as alleged in the evidence. Further and more importantly, it was never put to the plaintiff under cross-examination that

such a request had come from him. The trial judge ought to have taken this failure into account when he came to assess the evidence. But nowhere in his judgment is there any indication that he did so. In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770 at p. 794, this court, when applying the rule in *Browne v. Dunn* [1893] 6 R 67 said:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

We are satisfied that if the learned judge adopted the correct approach to the evaluation of evidence, we have no doubt that he would have found for the plaintiff.

There was however cross-examination by counsel for the third and fourth appellants of SP1 in regard to the salary vouchers as can be seen from p. 28 para. "E" to p. 29 para. "A" of the appeal record. But as I said the present appeal was launched by the first and second appellants only and certainly they cannot rely on the cross-examination of the salary vouchers mounted by the counsel for the third and fourth defendants of SP1 to back up their submission of fabrication before the appellate court. The trial court dealt with the issue of fabrication mounted by counsel for the third and fourth appellants at great length and the trial court finally concluded that the salary vouchers which were alleged to be fabricated were in fact not a sham. The trial court in the course of its judgment had considered the following salient points

(1) the credibility of the witnesses called by the respondents;

(2) the explanation of SP1 in regard to the stamping of the vouchers;

(3) the deceased could not have signed the vouchers after his death; and of crucial importance

(4) the signatures of the deceased on the salary vouchers though identified by SP1, went unchallenged and it remained so throughout the trial.

At p. 75 of the notes of evidence, the trial court came to a finding of fact in regard to the salary vouchers in these words:

> Accordingly, I have no hesitation in rejecting the submission that these vouchers are a sham.

A specific finding of fact by the trial court affords a strong ground for this court not to interfere with the decision of the trial court. In *Mathavan a/l Shunmugam v. Woo Bee Leng* [1995] 1 MLJ 841, I did say at p. 845 of the judgment:

> The principles on which an appellate court may interfere with a lower court's findings of fact can be found in the passages in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd* [1964] MLJ 87. His Lordship in that case said at p. 92:
>
> > There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt (or Thomas) v. Thomas* [1947] AC 484 at p. 487; [1947] 1 All ER 582 at p. 587:
> >
> > (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
> >
> > (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
> >
> > (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> The trial court in the instant appeal did not, in the course of analysing the evidence, go against the principles enunciated by Lord Thankerton as stated above.

It is pertinent to point out that the case of *Mathavan a/l Shunmugam v. Woo Bee Leng* was also reported in the Current Law Journal *vide* [1995] 2 CLJ 957. Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd* [1964] 30 MLJ 87 at p. 92 paras "C" to "O" right hand column said:

> Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co. Ltd.* [1919] SC (HL) 35, 37.

> In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Now, this court sitting in its appellate capacity cannot find any fault with the findings of fact as arrived at by the trial court. The trial court rightly and correctly analysed the evidence and came to a finding of fact which this court hold that it was not "plainly wrong" in the circumstances.

Whether the deceased was an employee of Zam Zam restaurant?

This was certainly a question of fact dependent largely on the available evidence in its printed form. Kumarasamy a/l Nadarajan (SD1), a certified public accountant, testified for the appellants. SD1 audited the accounts of Zam Zam restaurant and in preparing the audited accounts for 1991 he relied heavily on salary slips, vouchers and other documents (see p. 38 para. "C" of the appeal record). SP1, on the other hand, testified that apart from the salary vouchers he had no other records pertaining to the employment of the deceased with Zam Zam restaurant. It was SP1's testimony that the deceased, an Indian national, had no work permit and did not contribute to EPF or SOCSO for that matter (see pp. 27 to 28 of the appeal record). It was sought to argue that the vouchers, which were the only records pertaining to the employment of the deceased with Zam Zam restaurant, were in the possession of the respondents' solicitors from July 1991 until they were returned to SP1. That the vouchers were in the possession of the respondents' solicitors were amply explained at pp. 46 to 47 of the appeal record. That being the case, the certified public accountant in the person of SD1 cannot testify with any degree of certainty whether the deceased was working with Zam Zam restaurant at the material time and SD1 admitted this under cross-examination and when questioned by the trial court (see p. 38 of the appeal record). In my judgment, the evidence of SD1 cannot carry much weight when compared with the oral testimonies of SP1 and Abdul Kadir bin Abdul Rahman (SP3) coupled with the salary vouchers that were signed by the deceased and tendered before the trial court as exhibits. In regard to the salary vouchers, this was what the trial court said (see pp. 74 to 75 of the appeal record):

> It is to be noted that SP1 in his evidence explained that the vouchers were sent to the plaintiffs solicitors (meaning the respondents' solicitors) before they were stamped and that he was able to stamp these vouchers only when they were returned to him by the plaintiffs solicitors (again referring to the respondents' solicitors) to be produced in court. I find nothing improbable about this explanation.
>
> It is also significant that SP1 had identified the signatures on the vouchers (P1A to E) as that of the deceased. This evidence was not challenged. It cannot be gainsaid (that) the deceased could only have signed these vouchers before he died, not after.

It seems to me that counsel for the first and second appellants sought to impress upon this court to review the evidence and reverse the judgment of the trial court. It is obvious that the trial court's decision turned principally on questions of fact which depended largely on the credibility of conflicting witnesses. In *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243, Viscount Sankey LC at p. 249 lucidly said:

> It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court ... The onus is upon the appellant to satisfy the court that his appeal should be allowed ... On an appeal against a judgment after a trial before a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co.* per Lord Shaw where he says: 'When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen and heard them, and does not believe another.

In a separate judgment, Lord Wright said at p. 265 of the judgment:

> Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong': (The Julia), per Lord Kingsdown, cited with approval by Lord Summer. And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing.

Evidence wise there was a letter dated 11 July 1991 emanating from Zam Zam restaurant which was marked as exh. P2 and this very letter established beyond doubt that the deceased was an employee of that restaurant. The letter, shorn of its tautology, was worded thus:

Ruj. Tuan: BJK/QEI/91/91
Ruj. Kami:

Tarikh: 11th July, 1991

To:

Messrs G.T.S. & Americk Sidhu,

Advocates & Solicitors,
No. 35, Jalan Tuanku Munawir,
(Tingkat 1),
70000 Seremban.

Dear Sirs.

Re: Fatal accident on 19.5.91 at Jalan Pasir Pelangi, Johor Bahru involving m/bus and m/taxi and resulting in a passenger Abdul Shukoor Bin Abdul Karim being killed.

We refer to your letter dated 1st July, 1991 and confirm that Abdul Shukoor Bin Abdul Karim (I/C.No. 8275962), deceased was employed by us as a cook from 1.3.1991.

He was paid $50.00 per day on a daily rated basis. There were no EPF deduction(s).

He met with an accident on the 19th May, 1991 and as a result of which he passed away.

Yours faithfully,

Sgd (Illegible)
RESTORAN ZAM ZAM
39-F, Jalan Ah Fook,
Johor Bahru.

For these reasons, the answer to the question posed would be in the positive.

Whether The Deceased's Earnings Can Be Considered As Illegal?

It was undeniable that at the material time the deceased was without a work permit. SP1 gave a re-assuring evidence for the respondents. He testified that the deceased held a red identity card and had been in Malaysia since childhood. He was categorical when he testified that the deceased was

employed by Zam Zam restaurant as a cook and the deceased also doubled up as a cashier. According to SP1 the deceased earned RM50 per day with food and lodging provided by Zam Zam restaurant. The deceased worked between 24 to 26 days in a month and salary vouchers were signed by him. At the material time, the deceased was in the employment of Zam Zam restaurant and was on the way to the market to buy vegetables when the unfortunate accident took place. Of crucial importance were the assertions by SP1 that he knew that the deceased had to obtain a work permit and SP1 had promised the deceased that he would obtain a work permit for the deceased within a period of three months after recruitment. SP1 was categorical that he would obtain a work permit for the deceased as he wanted to ensure that the deceased would perform well. It must be emphasised that the first and second appellants failed to show by way of cross-examination of SP1 that the deceased was unlikely to get a work permit.

Now, evidence wise Zam Zam restaurant employed the deceased as a cook from 1 March 1991 and on 19 May 1991 when the accident happened which brought about the death of the deceased it was hardly three months since the date of employment. To be precise it was exactly two months 18 days. SP1 promised to obtain the work permit within a period of three months after recruitment and with the death of the deceased the whole exercise became academic. In *Chua Kim Suan & Teoh Teik Nam (suing as Administratrix and Administrator respectively of the Estate of Teoh Tek Lee, deceased) v. Government of Malaysia & Anor* [1994] 1 AMR 3: 89 SC, Peh Swee Chin SCJ delivering the judgment of the then Supreme Court said at p. 97 of the judgment:

> We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we should also follow, on this point, the decisions of *Ooi Han Sun; Burns; Lebagge and Dhlamini, supra* and approve the dictum in question in *Yaakob.* We therefore uphold the decision of the learned judge in the Court below and that of the learned Registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operation of the taxi should be disallowed; because *ex turpi causa non oritur actio* or in other words, such claim would be against public policy. We would like to emphasize the timely caution of the learned Chief Justice of Singapore in *Ooi* case, *supra,* that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

The deceased in *Chua Kim Suan's* case was running an unlicensed taxi and whatever earnings that flowed from it was categorised as illegal. In *Yaakob Foong v. Lai Mun Keong & Ors* [1986] 2 MLJ 317, the plaintiff there was a Malaysian working in Singapore without a work permit and the learned judge

observed by way of an *obiter* that if there had been some cogent evidence of the precise amount of income which would have been payable by the plaintiff to the Singapore tax authority then the necessary deductions would have to be made in assessing the plaintiff's earnings in Singapore. In *Tan Chooi Thin & Anor v. Teo Whee Hong* [1953] MLJ 203, the learned judge had to consider whether the deceased who died in a motor accident had derived an income from smuggling precious stones in contravention of customs legislation. The learned judge was of the view that if there had been reliable evidence of profit from the smuggling operations he would have included such income in assessing the deceased's earnings thereto.

But the illegality of the deceased's employment could have been legitimised. At this stage, a repetition of the facts is necessary. The deceased held a red identity card and according to SP1 the deceased was a permanent resident. At the time of the accident, the deceased's father was in Malaysia. SP1 promised to obtain the work permit for the deceased within a period of three months from the date of recruitment. There was no evidence to show that the deceased was unlikely to obtain a work permit. The same scenario appeared in *Nazori bin Teh & Anor v. Tay Lye Seng & Anor* [1995] 4 CLJ 740 where the defendant failed to show that the first plaintiff was unlikely to get a work permit. It was for this reason that the learned judge was of the view that the illegality was capable of being legitimised. At p. 743 of the judgment, the learned judge in *Nazori bin Teh & Anor v. Tay Lye Seng & Anor (supra)* had this to say and which I respectfully adopt:

> At p. 30 of the judgment, the learned judge citing *Ooi Han Sun & Anor v. Bee Hua May* [1991] 3 MLJ 219, another Singapore High Court case where no work permit was issued, succinctly summarised the principles in *Ooi Han Sun's* case as follows:
>
> (i) that the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in law of contract to prevent a plaintiff founding a claim on an illegal act or agreement;
>
> (ii) that the maxim has a limited application in tort and the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence in tort:
>
> (iii) the effect of illegality on quantum of damages is not to make compensation hopeless;
>
> (iv) that notwithstanding illegality damages would be awarded but there would be a discount for the *ex turpa causa*;
>
> (v) that consideration should be given to cases where illegality was capable of being legitimised; and

(vi) that the burden of proof of illegality was capable of being legitimised was on the plaintiff.

In my judgment, the earnings of the deceased can, in law, be legitimised and that being the case the earnings derived as a cook from Zam Zam restaurant was not illegal. Those earnings can be computed for purposes of loss of earnings sustained by the widow and her son. This was my judgment and I so hold accordingly.

There was a submission to the effect that the trial court was swayed by emotion when she (see p. 75 para "E" of the appeal record) remarked that:

> Her son was present in court and I observed that he is not able to walk and had to rely on his mother, a very small-sized person, to carry him.

With respect, this was the observation of the trial court in the course of the trial. Moreover there was a medical report appearing at p. 104 of the appeal record which showed the physical and mental retardation of that boy. The medical report in the form of a certificate was worded thus:

> Phone: 2001
>
> Dr. A.C. PADMANABHAN, M.D: D.C.H.
>
> Children Specialist,
> KANHANGAD
>
> Ref: No: Date: 1-8-91
>
> **CERTIFICATE**
>
> This is to certify that T.P. Safeer s/o Abdulshukkur, North Kovval, Trikarpur is suffering from cerebral palsy and mental retardation and child is physically and mentally disabled.
>
> (Dr. A.C. Padmanabhan)
>
> Sgd (Illegible) 1/8/91
> Dr. A.C. Padmanabhan,
> M.B.B.S., M.D. Dc. H,
> Assistant Surgeon
> General Hospital On Leave.

It was only natural that the mother carried her physically and mentally retarded son in the court room. Everyone would expect the mother to do just that. In my judgment, the criticism levelled against the trial court's observations of the widow and her son in open court was uncalled for and totally without merit. It was uttered in bad faith.

What Is The Standard Of Proof As Regards Earnings?

The earnings of the deceased were strictly proved and the respondents succeeded on this score. The oral testimony of SP1, the salary vouchers and the letter from Zam Zam restaurant marked as exh. (P2) as reproduced in the early part of this judgment all point to the earnings of the deceased at the material time. It must be emphasised that these documents went unchallenged. SP1 was cross-examined and it was put to him that the deceased was not gainfully employed by Zam Zam restaurant at the material time. SP1 stood his ground and disagreed. He categorically stated that the deceased was actively employed by Zam Zam restaurant at the material time. Shankar J (as he then was) in *Leng Yang Sua & Anor v. Ng Yen Kee & Anor* [1986] 1 CLJ 338 was of the view that special damages must be strictly proved and that the best available evidence must be produced. This was dutifully followed and done in the present case before the trial court and I so hold accordingly.

Whether For The Purposes Of s. 7(3)(iv)(a) Of The Civil Law Act 1956 (Act 67) It Must Be Proved That The Deceased Was Working For A Continuous Period Of Twelve Months Prior To His Death?

The words employed in s. 7(3)(iv)(a) of the Civil Law Act 1956 (Act 67) are unambiguous and incapable of any other interpretation. All that it requires was for the deceased to be "receiving earnings by his own labour or other gainful activity prior to his death." Here, the deceased prior to his death on 19 May 1991 was gainfully employed as a cook with Zam Zam restaurant. This was my judgment and I so hold accordingly.

This brings me to the next issue of whether living expenses may be deducted when it was not proved or admitted. Section 7(3)(iv)(c) of the Civil Law Act 1956 (Act 67) enacts that "the court shall take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the person deceased at the time of his death." In *Abdul Ghani bin Hamid v. Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 CLJ 317, I did say at p. 336 to p. 337 of the judgment the following:

> It is only logical that some part of the plaintiff's earnings must have been devoted to his own maintenance. But no matter how logical it may appear to be, it can only be deducted if the amount is either admitted by the plaintiff or proved by the defendant. Here, there is no admission by the plaintiff nor proved by the defendants and therefore no deduction would be made from the plaintiff's income (*Marappan a/l Koundar v. Siti Rahmah binti Ibrahim* [1990] 1 CLJ 32).

The Court of Appeal (Thomson CJ, Hill and Good JJA) in *Amar Singh v. Chin Kiew* [1960] 26 MLJ 77 at p. 78 said through Thomson CJ:

> Here we were referred to the decision of the Singapore Court of Appeal (of which I myself was a member) in the case of *Panicker v. Chwee May Kwong* [1958] MLJ 136. In that case the court reduced the damages awarded by the trial Judge on the basis that he should have deducted $50 a month from the estimated earnings of the deceased in respect of what ought to have been assumed to have been devoted to his own upkeep and maintenance.

Further down the same page of the same judgment, his Lordship Thomson CJ continued:

> In the present case it may well be that *per incuriam* the learned trial Judge has omitted to make any allowance for what the deceased spent upon himself.

In *P.R. Panickar v. Chwee May Kwong & Anor* [1958] 24 MLJ 136, the Court of Appeal comprising of Whyatt CJ, Thomson CJ (FM) and Knight J said through Whyatt CJ at p. 137:

> The principle to be followed in assessing damages in this kind of case is very clearly stated by Lord Wright in *Davies & Anor v. Powell Ouffryn Associated Collieries Ltd* [1942] AC 602 (at p. 617) in the following words: 'There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future possibilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt.

Whyatt CJ continued further to say at the same page of the same judgment the following:

> The learned Judge does not deal specifically with the question of how much of this sum was applied to the deceased's upkeep and maintenance but it is clear that, even allowing for the fact that the deceased, as part of his earnings received two free meals a day, a substantial sum should be deducted under this head.

These two Court of Appeal authorities must be viewed in the context of s. 7(3)(iv)(c) of the Civil Law Act 1956 (Act 67). Evidence wise, the deceased led a frugal life. Under re-examination, SP1 was quick to point out that the deceased did not smoke cigarette nor gamble. It seemed that the deceased had no vices at all. His food and lodging were provided by the employer. The salary which the deceased received was used wisely. The widow (SP2) gave evidence. She testified in Malayalam language through the court interpreter. Her evidence showed the deceased to be a good husband who:

(1) purchased a house in India in cash for the widow and her son;

(2) sent by bank draft in the widow's name on a monthly basis the sum of 10,000 rupees for her upkeep and that of her son in India; and

(3) visited the widow and her son in India at irregular intervals, sometimes between two or five months once and the deceased would stay there for that duration of time.

There was evidence emanating from SP1 which was unchallenged to the effect that RM1,000 would be able to purchase 10,000 rupees. I accept this piece of evidence as gospel truth since it was unchallenged. The widow testified that she needed two servants to care for her and her retarded son. This was a luxury which many Malaysians can ill afford. But not so in India. Everything in India must be cheap. A cook like the deceased can purchase a house in India with hard cold cash. The widow had no intention of re-marrying as she wanted to take care of her retarded son. She testified that she required 3,500 rupees to pay the electricity and water bills and a further 4,000 rupees for her son's medical bills. The doctor's fees came up to 200 rupees. According to the widow she used to send her son to the hospitals in Manipur, Banglore and Manglapuram. All these exotic names are in India.

Evidence wise, there should not be any deduction for the living expenses of the deceased as it was not admitted nor proved. But the trial court seemed to have deducted the living expenses of the deceased incurred at the time of his death. I shall now elaborate. The trial court made a specific finding of fact that the deceased was employed as a cook and was earning RM1,250 per month immediately prior to the accident on 19 May 1991 (see p. 75 of the appeal record). While the trial court recognised and paid lip service to the fact that "no deduction in respect of living expenses can be made in this case as they were neither proved nor admitted" (see p. 76 para "C" to "D" of the appeal record) yet the trial court reduced the loss of earnings by taking a figure of RM700 per month. This was what the trial court said at p. 78 of the appeal record:

> On the evidence I am not prepared to accept the bare assertion of the widow that her loss of dependency is RM1,000. However, I accept her evidence that the deceased sent her enough money to ensure that she and her son suffered no hardship. Taking all circumstances into consideration I assess the plaintiffs' loss (meaning the respondents' loss) of support at RM700 per month.
>
> Accordingly, the award for loss of earnings is RM134,000. I also order the usual interest and costs.

I venture to say that arithmetically a computation of RM700 per month times 16 years purchase or the statutory multiplier that was agreed upon would give a figure of RM134,400 and not RM134,000. For my part and applying my own mind to the whole perspective of the said appeal and giving the matter the best consideration I can, I am unable to disagree with the trial court's assessment of the loss of earnings suffered by the widow and her son. I am reminded of the speech of Lord Goddard in the case of *Heatley v. Steel Co. of Wales, Ltd* [1953] 1 All ER 489, 490 where his Lordship said:

> The court has, in the best way it can, to find a sum of money which it thinks will fairly compensate the family. One Judge may arrive at it in one way and another Judge in another.

Even though I am inclined to award RM1,250 per month for loss of support times 16 years purchase as opposed to what the trial court had awarded, I do not propose to disturb the trial court's award. In my judgment, the quantum arrived at by the trial court would fairly compensate the widow and her retarded son for the rest of their lives in India. The quantum would certainly put them in good stead in India. For the reasons adumbrated above, I dismissed the appeal with costs. I affirmed the decision of the trial court forthwith.